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SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 523

ANTHONY ALBANESE,

Petitioner,

—against—

N.V. NEDERL AMERIK STOOMV. MAATS,

Respondent,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Co-Petitioner.

REPLY BRIEF OF PETITIONER ALBANESE

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On Reply Brief

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REPLY BRIEF OF PETITIONER ALBANESE

Respondent persists in its refusal to cite or understand pertinent decisional authority by this Court. It seeks to justify the errors in the opinion below by citing inapposite cases and by quoting decisional law almost completely out of context. Our reply shall be brief on some of respondent's misunderstanding of maritime decisional law since *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872 (1956).

Though the issues are simple, the effect of the opinion below is far reaching and will seriously disrupt the uniformity of maritime law with respect to the meaning of maritime negligence, and the intended use of the safety regulations for longshoring promulgated by the U. S. Dept. of Labor as standards of safety.

Simply stated, the issues and positions of the parties are:

1. Does the definition of maritime negligence, as with the definition of any negligence, include constructive notice for liability as to what a shipowner should have known and done in the exercise of reasonable care? Petitioner answers "yes". Respondent and the Court below answer "no", confusing active supervision, which was not charged, with the exercise of reasonable care on what the shipowner knew or should have known, which was charged.

2. Is petitioner's status as a longshoreman different in the remedies and obligations owed him by a shipowner from that of a social guest or repairman, when his injuries are sustained while doing a seaman's work on board a vessel in navigable waters? Petitioner answers "yes". Respondent answers "no". The Court below agrees with respondent by relating longshoremen's rights in negligence to repairmen not doing seaman's work, and workers on so-called "dead ships", and in fact discriminating against petitioner by limiting a longshoreman's cause in negligence to only actual notice of danger to the shipowner.

3. Is the Fourth Circuit's *Provenza* v. *American Export Lines, Inc.*, 324 F. 2d 660 (1963), cert. denied 376 U. S. 952, in direct conflict with the opinion below, which pointedly has no mention of the *Provenza* case, though thoroughly briefed by the parties? Petitioner answers "yes". Respondant refers to dicta out of context to say "no". The Court below unequivocally holds against the *Provenza* principles by stating the safety regulations are not relevant and confusing to a jury.

I.

Petitioner's status as a longshoreman is erroneously confused with that of a social invitee; petitioner is not less deserving than a social invitee of an instruction on maritime negligence to include constructive notice.

The status of petitioner is the question on which the parties initially disagree. Respondent relies on authorities which are not concerned with longshoremen doing work traditionally done by seamen, and cites this Court's *Kermarec* v. *Comp. Gen. Trans. Atlantic,* 358 U. S. 625, 79 S. Ct. 406 (1959) to equate petitioner's status with that of a social visitor aboard a vessel. This Court clearly noted that *Kermarec* "was not a member of the ship's company, nor of that broadened class of workmen to whom the admiralty law has latterly extended the absolute right to a seaworthy ship . . . Kermarec was aboard not to perform ship's work, but simply to visit a friend" (p. 629 of 358 U. S.). There was no need for direct reference to the different nondelegable obligation in maritime law obliging the shipowner to provide a safe place to work for longshoremen. In footnote 3 of *Kermarec,* supra, this Court included constructive notice in the definition of negligence, where liability was prompted by a canvas defectively tacked which caused the dangerous condition "of which the shipowner's agent would have known in the exercise of ordinary care. By its verdict, the jury found that much and more" (p. 630 of 358 U. S.). To reverse a general jury verdict on erroneous principles of law is equivalent to a denial of due process. Such was done here.

Apparently respondent has not read footnote 9 of this Court's opinion in *Kermarec,* supra where the following salient distinction is drawn: "This is not to say that con-

cepts of status are not relevant in the law of maritime torts, but only that the meaningful categories are quite different", citing *Seas Shipping Co.* v. *Sieracki,* supra, as to those doing a "seaman's work and incurring a seaman's hazards" (p. 632 of 358 U. S.).

The contested instruction by the trial Court below, which included constructive notice as part of the definition of maritime negligence, predicated on reasonable care, should apply no less to a longshoreman than to a social invitee. But it is obviously clear that an obligation of a shipowner to provide a reasonably safe place to work is a non-delegable and continuing duty owed to longshoremen, pro hac vice seamen, and applies to longshoremen in a different maritime category with different maritime rights. So did this Court hold recently in *Gutierrez* v. *Waterman Steamship Corp.,* 373 U. S. 206 at pp. 210, 211, 212.

Inapposite cases on specialists and boom riggers cannot divert truth from the distinction between those doing seaman's work on a vessel in navigable waters and those otherwise employed. Control of the impact zone is not essential for shipowner negligence, and as this is so, how can the absence of active supervision over a dangerous condition without the shipowner's actual knowledge make any difference to liability for maritime negligence? Where the Court below found evidence sufficient to find unseaworthiness "because of a dangerous condition created by noxious fumes in the hold" (p. 483 of 346 F. 2d), it must follow that here there was also evidence sufficient for negligence.

II.

The Fourth Circuit's *Provenza* case is in direct conflict with the opinion below.

Respondent strangely contends *Provenza* v. *American Export Lines, Inc.*, supra, is consistent with the reversal below. Nothing can be further from the truth once the conclusion and the pertinent reasoning of the Court of Appeals for the Fourth Circuit are understood. The majority opinion, after stating that a violation of the regulations would prompt a shipowner's liability, goes on to state: "We are unable to escape the conviction that it was error for the court not to read the regulations as requested and charge the jury that they were binding in law" (p. 665 of 324 F. 2d).

The Fourth Circuit opnion clearly held that if a stevedore violated the safety regulations, this would be negligence of the shipowner, if "known, or by the exercise of reasonable care should have been known to the shipowner . . ." (p. 665 of 324 F. 2d), and assesses the safety regulations as prescribing a standard of safety, not a new duty: "Nothing in the regulation forbids its being mentioned to the jury" (p. 666 of 324 F. 2d). Safety standards are relevant and the capacity of a federal jury to understand has been emphasized by this Court. See: *Salem* v. *U. S. Lines Co.*, 370 U. S. 31 (1962). The error in reversing petitioner's judgment below is compounded where the record shows the safety regulations in question were actually read to the jury by other counsel, particularly respondent's, and not by petitioner's counsel (pp. 248a to 250a, 254a to 260a of defendant-appellant's appendix to brief below).

CONCLUSION

The novel and retrogressive definition of maritime negligence which excludes constructive notice must alert the Court in its paramount authority to provide uniformity in maritime law. Where there is a conflict between two circuits, apparent in the difference between the instant decision and *Provenza, supra,* all Courts litigating maritime cases must be guided by the direction and reasoning of this Court, not by the clearly erroneous and pre-*Sieracki* limitations set forth by the Court below.

For these reasons and those set forth in the petition, the totally and permanently crippled petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit, or that the Court below be summarily reversed as in *Palermo* v. *Luckenbach Steamship Co.,* 355 U. S. 20, and the judgment based on a jury verdct for petitioner be reinstated.

Respectfully submitted,

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